UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

MDL NO. 1430
MASTER FILE NO. 01-CV-10861-RGS

IN RE: LUPRON® MARKETING AND
SALES PRACTICES LITIGATION

MEMORANDUM AND ORDER ON DEFENDANT
TAP PHARMACEUTICAL PRODUCTS, INC.'S MOTION TO DISMISS
AETNA HEALTH, INC.'S FIRST AMENDED COMPLAINT

September 16, 2004

STEARNS, D.J.

On October 2, 2003, Aetna Health, Inc. (Aetna), a major medical insurer, filed this lawsuit against TAP Pharmaceutical Products, Inc. (TAP), in the federal district court for the Eastern District of Pennsylvania. Federal jurisdiction was premised on diversity of citizenship, TAP being an Illinois corporation, while Aetna is incorporated in the Commonwealth of Pennsylvania. The Complaint, which was framed exclusively on Pennsylvania state law, accused TAP of "defrauding and misleading Aetna with respect to the actual cost of TAP's prostate cancer drug Lupron®." Shortly after the Complaint was filed, the case was transferred to this court by the Judicial Panel on Multi-District Litigation (MDL) to be consolidated with Lupron®-related complaints brought by various other plaintiffs against TAP and its parent companies, Abbott Laboratories (Abbott) and Takeda Chemical Industries, Ltd. (Takeda). After the transfer, Aetna amended the Complaint to add three counts under the civil provisions of the federal Racketeer Influenced and Corrupt

Organizations Act (RICO), 18 U.S.C. § 1962.[1] TAP then moved to dismiss the Amended Complaint, contending that Counts II and V are identical to causes of action that were previously dismissed by the court in the main MDL proceeding, and that the remaining claims are either not plead with the particularity required by Fed. R. Civ. P. 9(b), or limn causes of action that are not recognized under Pennsylvania law.[2]

Immediately prior to the August 4, 2004 hearing on TAP's motion to dismiss, Aetna waived Count VI (negligent misrepresentation) and Count X (negligence *per se*) of the Amended Complaint. During oral argument, in response to a question by the court, Aetna's counsel agreed that Count VIII (directing tortious conduct) sets out a legal theory that is not (as yet) recognized by the courts of Pennsylvania. Consequently, Aetna agreed to waive that count as well. Cf. Ryan v. Royal Ins. Co. of America, 916 F.2d 731, 744 (1st Cir. 1990).

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[1]As amended, the Complaint set out the following claims in ten counts: Counts I and II - RICO (separate enterprise theories); Count III - RICO conspiracy; Count IV - insurance fraud, 18 Pa. C.S.A. § 4117; Count V - common-law fraud; Count VI - negligent misrepresentation; Count VII - civil conspiracy; Count VIII - directing tortious conduct; Count IX - aiding and abetting tortious conduct; and Count X - negligence *per se*.

[2]In its Memorandum, TAP refers the court to portions of a Joint Memorandum that it filed with Abbott and Takeda in support of the motion to dismiss the MDL Consolidated Class Action Complaint (specifically pages 2-3 and 5-14). Relying on Watterson v. Page, 987 F.2d 1, 3-4 (1st Cir. 1993), Aetna asks that the court not consider the referenced arguments as the Joint Memorandum appends "an extensive collection of exhibits and outside sources not attached to the subject complaint nor expressly incorporated therein." Aetna Opposition, at 2 n.1. TAP points to the exceptions to the "outside document" rule for documents "the authenticity of which are not disputed by the parties; for official public records; for documents central to plaintiff's claim; or for documents sufficiently referred to in the complaint." Watterson, 987 F.2d at 3-4. It would appear that under the rule only the Joint Memorandum (and not the attached exhibits) qualifies for the court's consideration. See Davidson v. Cao, 211 F. Supp. 2d 264, 267-268 n.2 (D. Mass. 2002).

The RICO Claims

Count I of the Amended Complaint alleges an "association-in-fact" enterprise consisting of TAP, Abbott, and Takeda, with TAP as the RICO "person," 18 U.S.C. § 1961(3). In the main MDL proceeding, the court addressed a nearly identical theory of RICO pleading, finding that factual allegations similar to those set out in Aetna's Amended Complaint were sufficiently detailed to satisfy Rule 9(b).[3] The court also explained that while a defendant cannot share dual RICO identities as a "person" and an "enterprise," an association-in-fact is a distinct conceptual entity for RICO purposes. As there are no material differences between the structure of the enterprise set out in the MDL Consolidated Class Action Complaint and the enterprise described in Count I of Aetna's Amended Complaint, the motion to dismiss will be denied as to Count I and Count III (the RICO conspiracy count), for the reasons stated in the earlier action.[4] See Lupron Marketing and Sales Practices Litigation, 295 F. Supp. 2d 148 (D. Mass. 2003). Consistent, however, with this prior ruling, the court will dismiss Count II, which pleads an association-in-fact consisting of TAP and every medical provider in the United States who dispensed Lupron®. As was the case with the MDL Consolidated Class Action Complaint, there are no "command and control" allegations sufficient to satisfy the "continuing unit" element of a RICO enterprise. See United States v. Turkette, 452 U.S. 576, 583 (1981).

[3]The factual allegations in Aetna's Amended Complaint appear to have been largely borrowed from the Consolidated Class Action Complaint filed by the MDL plaintiffs.

[4]TAP acknowledges that its arguments with respect to these two RICO counts have been previously rejected by the court, but raises them again by reference to preserve its rights of appeal. See footnote 2, supra.

The Pennsylvania Insurance Fraud Statute

Count IV of the Complaint alleges violations of Pennsylvania's Insurance Fraud Statute, 18 Pa.C.S.A. § 4117(a)(2).[5] Under this statute "[a] person commits an offense if the person . . .

> (2) [k]nowingly and with the intent to defraud any insurer or self-insured, presents or causes to be presented to any insurer or self-insured any statement forming a part of, or in support of, a claim that contains any false, incomplete or misleading information concerning any fact or thing material to the claim."

Aetna alleges that by causing the publication of an inflated AWP for Lupron®, and by encouraging medical providers (some complicitous, others apparently not) to submit claims on behalf of (innocent) patients based on the inflated AWP, TAP "caused many thousands of materially false reimbursement requests to be submitted to third party payors (sic) like Aetna." Aetna Opposition, at 15.

TAP, for its part, argues that the Insurance Fraud Statute "has never been used to create [civil] liability against a third party who was not directly involved with submitting claims to insurance companies."[6] TAP Memorandum, at 11. Aetna, while not disputing TAP's summary of the reported cases, nonetheless maintains that the plain language of the statute reaches indirect as well as direct conduct.

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[5]The Statute as originally enacted applied only to fraudulent motor vehicle insurance claims. It was amended in 1990 to extend its coverage to all fraudulent insurance claims.

[6]See, e.g., Allstate Ins. Co. v. American Rehab and Physical Therapy, Inc., ___ F. Supp. 2d ___ 2004 WL 1774572 *4 (E.D. Pa. Aug. 9, 2004) (provider fraud); Valenti v. Allstate Ins. Co., 243 F. Supp. 2d 200, 203 (M.D. Pa. 2003) (fraudulent fire damage claim); Hepps v. General American Life Ins., 1998 WL 564497 *3 (E.D. Pa.) (fraudulent disability claim); Parasco v. Pacific Indemnity Co., 920 F. Supp. 647, 657 (E.D. Pa. 1996) (same).

> The legislature's decision to include the "causes to be presented" clause signals an intent to penalize the submission of fraudulent statements to insurers, whether the defrauder submits the information itself, or causes its submission through an intermediary. . . . Interpreting the insurance fraud statute to include TAP's conduct within its sweep is in keeping with Pennsylvania's policy of broad interpretation of fraud statutes.

Aetna Opposition, at 16-17. Pennsylvania, not atypically, tends to be very protective of its citizens (including corporate citizens like Aetna) who are exposed to marketplace fraud, and its courts are consequently enjoined to construe fraud statutes broadly. Commonwealth v. Monumental Properties, 459 Pa. 450, 479-480 (1974). As evidenced by the phrase "causes to be presented," the intent of the Insurance Fraud Statute is to protect insurers from all fraudulent claims, whether directly submitted by an insured, or submitted at the instigation of a third party not directly involved in the claims process.[7] Cf. Commonwealth v. Sanchez, 848 A.2d 977, 982-83 (Pa. Super. Ct. 2004) (affirming the criminal conviction of a defendant who aided and abetted a fraudulent claim, where the defendant knew of the intended fraud and signed an odometer statement and a power of attorney authorizing the filing of the claim).

Statutory construction begins and ends with the express wording of an

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[7]As constructed, the Insurance Fraud Statute is penal in nature and most of its provisions relate to criminal prosecutions. Subsection (g), however, authorizes an insurer that is injured as a result of a violation of the statute's criminal provisions to bring a civil action to recover compensatory damages, investigative costs, and attorneys' fees. Treble damages may also be awarded where a defendant "has engaged in a pattern of violating this section." Under Pennsylvania law, non-penal provisions of a penal statute are liberally construed. See Monumental Properties, 459 Pa. at 460. See also Masland v. Bachman, 374 A.2d 517, 523-524 (Pa. 1977) ("Laws enacted for the preventing of fraud, for the suppression of a public wrong, or to effect a public good, are not in the strict sense, penal acts, although they may inflict a penalty for violating them.") (quoting Taylor v. United States, 44 U.S. 197, 210 (1844)).

unambiguous statute. Estate of Cowart v. Nicklos Drilling Co., 505 U.S. 469, 475 (1992) ("[W]hen a statute speaks with clarity to an issue judicial inquiry into the statute's meaning, in all but the most extraordinary circumstance, is finished."). "In other words, the court need not consult legislative history and other aids to statutory construction when the words of the statute neither create an ambiguity nor lead to an unreasonable interpretation." Riva v. Commonwealth of Massachusetts, 61 F.3d 1003, 1007 (1st Cir. 1995). Such is the case here.

Common-Law Fraud (Intentional Misrepresentation)

To state a claim of intentional misrepresentation under Pennsylvania law, a plaintiff must allege (1) a material representation, (2) made either with knowledge of its falsity or with reckless disregard for its truth, and with the intent to induce another into relying on its truth, (3) justifiable reliance, (4) and a resulting injury. See Bortz v. Noon, 556 Pa. 489, 499, 729 A.2d 555, 560 (1999). See also Blumenstock v. Gibson, 811 A.2d 1029, 1034 (Pa. Super. 2002) ("Fraud is a generic term used to describe anything calculated to deceive, whether by single act or combination, or by suppression of truth, or suggestion of what is false, whether it be by direct falsehood or by innuendo, by speech or silence, word of mouth, or look or gesture."). "To be actionable, a misrepresentation need not be in the form of a positive assertion but is any artifice by which a person is deceived to his disadvantage and may be by false or misleading allegations or by concealment of that which should have been disclosed, which deceives or is intended to deceive another to act upon it to his detriment." Wilson v. Donegal Mutual Insurance Co., 410 Pa. Super. 31, 41, 598 A.2d 1310, 1315 (1991), (citing Delahanty v. First Pennsylvania Bank, N.A., 318

Pa. Super. 90, 108, 464 A.2d 1243, 1252 (1983)). However, where the gravamen of the alleged fraud rests on a defendant's omissions (rather than its affirmative misrepresentations), the fraud is actionable only where the defendant has a duty to speak. See e.g., In re Estate of Evasew, 526 Pa. 98, 105, 584 A.2d 910, 913 (1990) ("[A]n omission is actionable as fraud only where there is an independent duty to disclose the omitted information; and that such an independent duty exists where the party who is alleged to be under an obligation to disclose stands in a fiduciary relationship to the party seeking disclosure . . . ."); Wilson, 410 Pa. Super. at 41, 598 A.2d at 1316 (same). Cf. Smith v. Renaut, 387 Pa. Super. 299, 306, 564 A.2d 188, 192 (1989).

TAP maintains that Aetna's Complaint fails to allege "that TAP made a false representation, that TAP owed Aetna any duty, that TAP intended to deceive Aetna, that Aetna justifiably relied on any alleged misrepresentation or omission, or that Aetna's alleged injuries are the proximate result of any alleged misrepresentations or omissions." TAP Memorandum, at 12-13. The elements that merit discussion are those of duty and reliance. As the court stated in its prior opinion, while there is no duty incumbent on a manufacturer to disclose the prices that it charges intermediate suppliers for its products, the rule is different in cases like this one, where the allegation is one of affirmative misrepresentation by TAP of the actual cost of Lupron®. In re Lupron, 295 F. Supp. 2d at

167-168. Hence, the fact that TAP owed no duty to Aetna to disclose the "true" price of Lupron®, while an accurate statement of law, is of no consequence.[8] Count V, however,

[8]While Aetna generically pleads "omissions" on the part of TAP, the factual allegations of the Amended Complaint make clear that Aetna's grievance is directed to

fails for the same reasons that the court dismissed the common-law fraud claims in the MDL Consolidated Class Action Complaint.

> Common-law fraud is no more exempt than is statutory fraud from Rule 9(b)'s requirement that "the circumstances constituting fraud or mistake shall be stated with particularity." Count XVI (the common-law fraud Count), generically incorporates all of the preceding paragraphs of the Amended Complaint, and in that respect, sufficiently identifies the alleged false statements of fact. The Count, however, does not allege that the defendants intended that the individual plaintiffs be deceived by these statements, or that any plaintiff actually relied on the defendants' misrepresentations. (It is not enough to simply aver that plaintiffs "reasonably relied upon the veracity of [d]efendants regarding the AWP."). Consequently, this Count will be dismissed. See Manning v. Utilities Mut. Ins. Co., 254 F.3d 387, 401 (2d Cir.2001).

In re Lupron, 265 F. Supp. 2d at 181-182. While Aetna's Amended Complaint ritually recites "reasonable reliance" and a purpose on the part of TAP "to induce Aetna to make higher payments," no concrete facts are plead in support of these generic allegations.[9]

Civil Conspiracy

Unlike the RICO conspiracy set out in Count III, which alleges an agreement among TAP, Abbott, and Takeda to engage in a pattern of racketeering activity, Count VII broadly alleges that TAP conspired with "Abbott, Takeda, and various health care providers, in an effort to fraudulently induce Aetna into overpaying for Lupron®, to misrepresent or conceal material facts from Aetna, or to remain silent when it knew that Aetna was being misled by

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what TAP said and did, and not to what it failed to disclose.

[9]While it seems clear enough from the body of the Amended Complaint that the statements on which Aetna purports to have relied are the reported AWPs for Lupron® that TAP caused to be published, there are no factual allegations explaining how Aetna came to rely on these statements or the extent to which they influenced the actual payment of claims.

its misrepresentations and/or omissions . . . ." First Amended Complaint ¶ 145. Under Pennsylvania law, a claim of civil conspiracy requires proof of the following elements: "(1) a combination of two or more persons acting with a common purpose to do an unlawful act or to do a lawful act by unlawful means or for an unlawful purpose; (2) an overt act done in pursuance of the common purpose; and (3) actual legal damage . . . . Proof of malice or an intent to injure is essential to the proof of a conspiracy." Strickland v. University of Scranton, 700 A.2d 979, 987-988 (1997).

I agree with TAP that Aetna has failed to allege sufficient facts to support the civil conspiracy claim. The Amended Complaint fails to identify any of the health care providers who are alleged to have been part of the conspiracy. See Fresh Made, Inc. v. Lifeway Foods, Inc., 2002 WL 31246922, at *10 (E.D. Pa.). There are no factual allegations suggesting that the alleged conspirators acted pursuant to a common purpose (as opposed to individual self-interest). And finally, no facts are plead to support a specific intent on the part of TAP to injure Aetna. See Jeter v. Brown & Williamson Tobacco Corp., 294 F. Supp. 2d 681, 688 (W.D. Pa. 2003) ("To maintain a conspiracy claim, plaintiff also must make a showing that [the defendant] exhibited malice. Malice exists only 'where the sole purpose of the conspiracy is to cause harm to the party who claims to be injured.'").

Aiding and Abetting Tortious Conduct

Count IX of the Amended Complaint alleges that Aetna "aided and abetted health care providers in making multiple fraudulent and negligent misrepresentations to Aetna including setting a wholesale price at which it actually sold Lupron®; listing the AWP of

Lupron® in publications at an amount materially greater that the actual average wholesale price; contacting publications for the purpose of falsely setting and controlling the listed AWP; sending the AWP to health care providers; creating and disseminating marketing materials inducing health care providers to exploit Lupron®'s inflated AWP." First Amended Complaint ¶ 160.

According to Restatement (Second) of Torts § 876(b), "[f]or harm resulting to a third person from the tortious conduct of another, one is subject to liability if he (a) does a tortious act in concert with the other or pursuant to a common design with him, or (b) knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself, or (c) gives substantial assistance to the other in accomplishing a tortious result and his own conduct, separately considered, constitutes a breach of duty to the third person." Aiding and abetting is not an independent and freestanding tort. What is missing in Count IX as plead is any specification of the underlying tort that TAP is alleged to have aided and abetted. (While the count alludes to negligent and intentional misrepresentation, Aetna has waived the negligent misrepresentation claim, and the court has dismissed the common-law fraud claim.)[10]

Statute of Limitations

TAP argues that all of Aetna's claims are precluded by the statute of limitations.

[10]While TAP originally questioned whether an aiding and abetting claim is viable under Pennsylvania law, Aetna cites Burnside v. Abbott Laboratories, 351 Pa. Super. 264, 281, 505 A.2d 973, 982 (1985), as persuasive authority that there are circumstances, however limited, in which Pennsylvania would recognize a cause of action under section 876.

This case was filed in October of 2003. The parties agree that Counts I and III (the surviving RICO claims) are governed by a four-year statute of limitations. TAP maintains that the Pennsylvania Insurance Fraud Statute is governed by a two-year statute of limitations. Cf. State Farm Mut. Auto. Ins. Co. v. Makris, 2002 WL 826431, at *4 (E.D. Pa.) (so stating in dicta). See also 42 Pa.C.S.A. § 5524(7) (a two-year statute of limitations applies to actions based on fraud and deceit unless another limitations period is specified). Aetna, for its part, argues that the six-year "catch-all" limitations period of the Judicial Code, 42 P.C.S. § 5527(6), which governs private actions under Pennsylvania's Unfair Trade Practices and Consumer Protection Law, applies. See Gabriel v. O'Hara, 368 Pa. Super. 383, 395, 534 A.2d 488, 494 (1987). Whichever limitations period does apply, Aetna's fundamental defense is one of fraudulent concealment. See 2 Standard Pennsylvania Practice 2d § 13:148 (June 2003) (in an action for fraud, "the statute of limitations generally runs from the date of the fraud complained of, unless such fraud has been actively concealed by the defendant"). TAP, in response, argues that Aetna has failed to allege fraudulent concealment with the requisite specificity.

Given the intensely factual nature of a fraudulent concealment claim, the court will defer a decision as to which limitations period applies to the summary judgment phase of the case (or perhaps during the interval entertain a motion by the parties to certify the issue to the Supreme Court of Pennsylvania). As the court observed in addressing defendants' challenge to the alleged failure of the plaintiffs in the main MDL action to adequately plead fraudulent concealment:

> [w]hether a plaintiff knew or should have known of an injury so as to trigger

> the running of a statute of limitations is, with rare exception, a jury issue. See Santiago Hodge v. Parke Davis & Co., 909 F.2d 628, 633 (1st Cir.1990) ("The determination of when appellees had knowledge of 'both the injury and its connection with the act of defendant,' is a question of fact."). Cf. Young v. Lepone, 305 F.3d 1, 8-9 (1st Cir.2002) (in a securities law context, factual questions as to whether "storm warnings" were sufficient to put an investor on inquiry notice are only to be determined as a matter of law when the underlying facts are either admitted or undisputed). Compare Jablon v. Dean Witter & Co., 614 F.2d 677, 682 (9th Cir.1980) (affirming a dismissal on limitations grounds where the running of the statute was apparent on the face of the complaint). While it can be fairly argued that the plaintiffs have but weakly plead facts sufficient to invoke the fraudulent concealment doctrine, they have plead enough to preclude a resolution of this issue as a matter of law at this preliminary stage of the proceedings.

In re Lupron, 295 F. Supp. 2d at 183-184.

ORDER

For the foregoing reasons, TAP's motion to dismiss is DENIED as to Counts I, III, and IV of Aetna's First Amended Complaint, and ALLOWED as to Counts II, V, VII, and IX. The remaining Counts have been WAIVED.

SO ORDERED.

/s/ Richard G. Stearns

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UNITED STATES DISTRICT JUDGE